

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

| | | |
|----------------------------------|---|-------------|
| IN THE MATTER OF THE APPLICATION |) | |
| FOR BENEFICIAL WATER USE PERMIT |) | FINAL ORDER |
| 90192-s76D BY GREGORY L. AND |) | |
| KATHY J. FISHER |) | |

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the August 9, 1995, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 90192-s76D is granted to Gregory L. and Kathy J. Fisher to appropriate 50 gallons per minute up to 80.65 acre-feet per year of the waters of Therriault Creek at a point in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 34, Township 36 North, Range 26 West, in Lincoln County, Montana. Fifty gallons per minute up to 72.37 acre-feet of water per year will be appropriated for fish and wildlife in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 34 from January 1 through December 31, inclusive of each year and 50 gallons per minute up to 8.28 acre-feet of water per year will be appropriated for irrigation of three acres in the

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SE~~SE~~NE~~NE~~ of Section 34 from April 1 through October 15, inclusive of each year. The means of diversion will be a headgate with an eight-inch pipeline. The water will be stored in an off-stream reservoir with a capacity of one acre-foot.

A. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights, as provided by Montana law.

B. This right is subject to the condition that the appropriators shall install an adequate flow metering device to allow the flow rate and volume of water diverted to be recorded. The appropriators shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records by November 30th of each year and/or upon request to the Water Resources Regional Office at 3220 Highway 93 South, P.O. Box 860, Kalispell, Montana.

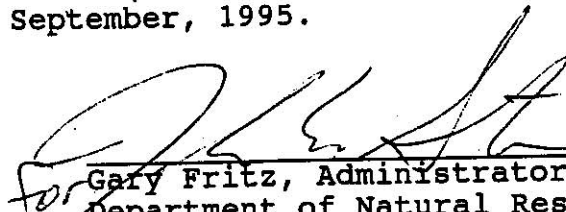
NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and

Conservation for the ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the oral proceedings to the district court.

Dated this 21 day of September, 1995.

 *ASST. ADMIN.*
for Gary Fritz, Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record, first class mail, at their address or addresses this ~~22nd~~ ^{25th} day of September, 1995 as follows:

Gregory L. and Kathy J. Fisher
P.O. Box 1418
Eureka, MT 59917

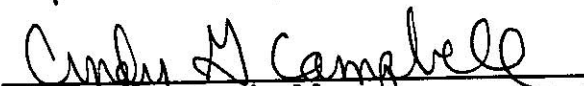
Therriault Corp.
c/o Maxine Vredenburg, Mgr.
P.O. Box 990
Eureka, MT 59917

Glen Lake Irrigation Dist.
P.O. Box 297
Eureka, MT 59917

Connie J. Schreier
Attorney at Law
P.O. Box 1287
Eureka, MT 59917

Charles Brasen, Manager
Kalispell Water Resources
Regional Office
3220 Highway 93 South
P.O. Box 860
Kalispell, MT 59903-0860
(via electronic mail)

Vivian A. Lighthizer,
Hearing Examiner
Department of Natural
Resources & Conservation
1520 E. 6th Ave.
Helena, MT 59620-2301


Cindy G. Campbell
Hearings Unit Legal Secretary

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT)
90192-s76D BY GREGORY L. AND)
KATHY J. FISHER)

PROPOSAL
FOR
DECISION

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on July 13, 1995, in Eureka, Montana, to determine whether a beneficial water use permit should be granted to Gregory L. and Kathy J. Fisher for the above-entitled application under the criteria set forth in Mont. Code Ann. §§ 85-2-311(1) and (5) (1993).

APPEARANCES

Applicants Gregory L. and Kathy J. Fisher appeared at the hearing by and through Gregory L. Fisher.

Charles F. Brasen, Manager of the Kalispell Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), attended the hearing.

Objectors Therriault Corp. and Glen Lake Irrigation District failed to appear at the hearing. The record shows a properly constituted Notice of Hearing was served on all parties on June 6, 1995, by certified mail. See Mont. Admin. R. 36.12.204(1) (1994). The Hearing Examiner received no communication from Objectors prior to the hearing or subsequent to the close of the hearing. Therefore, Objectors Therriault Corp. and Glen Lake

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Irrigation District are in default and no longer have status as parties in this matter. Mont. Admin. R. 36.12.208 (1994).

EXHIBITS

Applicants offered three exhibits for the record. All were accepted without objection.

Applicants' Exhibit 1 consists of 11 photographs. Photographs 1, 2, and 3 depict the uncompleted headgate and intake pipeline. Photographs 4, 5, and 6 show the outflow pipe which would return the water to the creek. Photograph 7 is of the pond standing directly above the outlet pipe showing that the pond is at a depth of four feet with only four feet more needed to fill it to the elevation of the island. The water in the pond is two feet higher than the water in the creek. Photograph 8 shows the southeast corner of the pond. Photograph 9 is taken looking to the south showing the pond, island, and the orange flagging for the path of the intake pipe. Photograph 10 is a closer view of the water in the pond facing toward the island from the west side of the pond showing the water that has been in the pond since a week after the pond was dug. Photograph 11 is about mid-point on the left side of the pond facing south.

Applicants' Exhibit 2 is a letter dated July 6, 1995, to the Kalispell Water Resources Regional Office of the Department of Natural Resources and Conservation (Department) from the Field

Office of the Natural Resources Conservation Service¹ (NRCS) of the United States Department of Agriculture.

Applicants' Exhibit 3 is a one-page proposed agreement to settle the objections to this application.

Applicants' Exhibit 4 is a copy of a portion of a USGS topographical map showing the location of the pond.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

1. Application for Beneficial Water Use Permit in the name of Gregory L. and Kathy J. Fisher and signed by Gregory L. Fisher was filed with the Department on June 13, 1994, at 10:25 a.m. (Department file.)

2. Pertinent portions of the file were published in *Tobacco Valley News*, a newspaper of general circulation in the area of the source, on September 29, 1994. Additionally the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the proposed appropriation. Two timely objections were received by the Department and Applicants were notified of the objections by a letter from the Department dated October 28, 1994. (Department file.)

¹Formerly known as the Soil Conservation Service

3. Applicants seek to appropriate 50 gallons per minute up to 80.65 acre-feet per year of the waters of Therriault Creek at a point in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 34, Township 36 North, Range 26 West, in Lincoln County, Montana.² The proposed use is 50 gallons per minute up to 72.37 acre-feet per year for fish and wildlife from January 1 through December 31, inclusive of each year and 50 gallons per minute up to 8.28 acre-feet per year for irrigation of three acres in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 34 from April 1 through October 15, inclusive of each year. The proposed means of diversion is a headgate with an eight-inch pipeline. The water would be stored in an off-stream reservoir with a capacity of one acre-foot. (Department file and testimony of Gregory Fisher.)

4. Applicants have proven by a preponderance of evidence there are unappropriated waters in the source of supply at the proposed point of diversion at times when the water can be put to the use proposed, in the amount Applicants seek to appropriate and that the amount requested is reasonably available during the period in which Applicants seek to appropriate. Applicants are downstream of the Glen Lake Irrigation District's point of diversion. Applicants have measured the flow of Therriault Creek at the proposed point of diversion to be 23.2 cubic feet per

²Unless otherwise stated all land descriptions in this Proposal are in Township 36 North, Range 26 West, Lincoln County, Montana.

second on one occasion and approximately 40 cubic feet per second on another. (Department file and testimony of Gregory Fisher.)

5. Applicants have proven by a preponderance of evidence the water rights of a prior appropriator will not be adversely affected by the proposed appropriation. Most of the water would be returned to the creek and according to the calculations of the local NRCS official the amount of water consumed would have minimal effect on all downstream users. (Department file, Applicants' Exhibit 2, and testimony of Gregory Fisher.)

6. Applicants have proven by a preponderance of evidence the proposed means of diversion, construction and operation of the appropriation works are adequate. An experienced contractor who has built several ponds in the area, excavated the pond area. A concrete headgate would be constructed at the point of diversion. A buried eight-inch pipeline would convey the water from the creek to the pond. Both the intake and the outlet would be equipped with control gates. The entire project would be completed according to NRCS specifications and under the supervision of the Resource Conservationist. (Applicants' Exhibits 1 and 2 and testimony of Gregory Fisher.)

7. Applicants have proven by a preponderance of evidence they have a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. They own the property where the water is to be put to beneficial use. Applicants presented a deed at the hearing but did not wish to enter it as

an exhibit. The Hearing Examiner read the deed which conveyed the property to Applicants. (Department file.)

8. Applicants have proven by a preponderance of evidence the proposed uses, fish and wildlife and irrigation are beneficial uses. Both uses are identified in Mont. Code Ann. § 85-2-102(2) (1993) as beneficial uses. Applicants would benefit recreationally by viewing the wildlife on the property they plan to irrigate and by fishing in the pond. (Testimony of Gregory Fisher.)

9. Applicants are not required to prove no adverse effect to water quality or the ability of a discharge permit holder to satisfy effluent limitations. No objections relative to water quality were filed against this application nor were there any objections relative to the ability of a discharge permit holder to satisfy effluent limitations of his permit. (Department file.)

10. Applicants proposed an agreement which was not accepted by either objector; therefore, Applicants are not bound by that agreement. (Applicants' Exhibit 3.)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all substantive procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner. See Findings of Fact 1 and 2.

2. Applicants have met all the criteria for issuance of a beneficial water use permit. See Findings of Fact 3 through 10. Mont. Code Ann. § 85-2-311 (1993).

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 90192-s76D by Gregory L. and Kathy J. Fisher to appropriate 50 gallons per minute up to 80.65 acre-feet per year of the waters of Therriault Creek at a point in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 34, Township 36 North, Range 26 West, in Lincoln County, Montana. Fifty gallons per minute up to 72.37 acre-feet of water per year will be appropriated for fish and wildlife from January 1 through December 31, inclusive of each year and 50 gallons per minute up to 8.28 acre-feet per year of water per year will be appropriated for irrigation of three acres in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 34 from April 1 through October 15, inclusive of each year. The means of diversion will be a headgate with an eight-inch pipeline. The water will be stored in an off-stream reservoir with a capacity of one acre-foot.

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NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner.

The defaulted objectors are restricted to excepting to the default ruling. The Department will disregard any exceptions submitted by the defaulted objectors on other substantive issues. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 9th day of August, 1995.


Vivian A. Lighthizer
Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620
(406) 444-6615

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record, first class mail, at their address or addresses this 9th day of August, 1995, as follows:

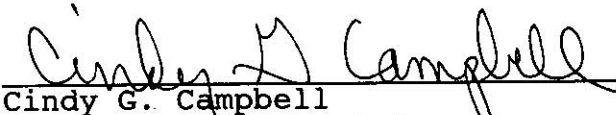
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